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NO. 802

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

NETTIE SMITH, APPELLANT

VS.

HUNTER SMITH, APPELLEE

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

J. W. MAXWELL

Counsel for Appellant

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The appellant presents this short memorandum in opposition to the motion to dismiss or affirm. This opposition statement is presented primarily to meet certain statements of fact which we deem to have been erroneously stated in the appellee's motion.

We shall only attempt to meet these matters in the chronological order as they appear in the brief of the appellee.

DEFAULT OF ALIMONY PAYMENTS: At page 4 of the Motion to Dismiss, this statement appears:

> "It will be noted that appellant in the instant suit introduced no evidence in support of her allegations that alimony payments were delinquent or the sum total of any purported delinquency."

(a) We respectfully direct the court's attention to the statements contained in our Jurisdictional Statement on this question, we shall not repeat.

(b) We assert that the transcript of the testimony will disclose that the appellant in her testimony testified both in support of her allegations that alimony payments were delinquent and that there was then accrued delinquency. Furthermore, upon the filing of the alleged Arkansas divorce decree in the Circuit Court of Raleigh County, West Virginia, an amended bill was filed and thereafter a second amended bill was filed and from both of these bills it is clearly disclosed by the allegations of the last amended bill and undenied by the answer, that there is default in the payment of adjudged alimony and claim asserted for its recovery in this suit, i.e., to have a decree in the present West Virginia suit carrying into effect the Arkansas judgments, which the appellant claims to be a voluntary consent decree entered in the court of competent jurisdiction at the behest of the appellee and binding on him as any other consent judgment would bind. (1)

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(1) The Arkansas Statute — 1947 — Official Edition, Vol. 1, Section 34-1201, vests jurisdiction in the Chancery Courts of Arkansas in this Language:

"The *action for alimony*, or divorce shall be by equitable proceedings". (Emphasis mine)

Thus, the Chancery Court of Garland County had jurisdiction of the subject matter, (1) alimony and (2) the person of appellee, and having such jurisdiction at the instances of the appellee; the Court entered a consent decree for alimony. For the adjudication of Alimony Domicile was wholly unnecessary. For divorce domicile was essential to the jurisdiction of the court. The two subjects are treated in the disjunctive under the Arkansas statute.

It is indeed difficult to understand, in the light of the record and the brief filed, why counsel should make the statement, "No evidence in support of her allegations that alimony payments were delinquent," etc. We vouch that there is both, evidence and undenied pleaded allegations to sustain the delinquency in payment.

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THE FEDERAL QUESTION WAS RAISED AT THE TRIAL: At page 10 of the Motion to Dismiss or Affirm, the appellee says:

> "Appellant now belatedly asserts that the Arkansas jurisdictional divorce statute is violative of Section I of the Fourteenth Amendment to the Constitution of the United States, and that the Arkansas divorce decree based thereon is not entitled to full faith and credit under the provisions of Section I, Article IV of said Constitution. Appellee submits that neither of these questions were raised in the Circuit Court of Raleigh County, West Virginia, by proper pleading or otherwise, * * * * * *"

And again on page eleven:

> **"In fact, the constitutionality of the Arkansas jurisdictional divorce statute was never mentioned by appellant at any stage of the proceeding in the trial court.** It is submitted that appellant did not make the required explicit and timely insistance in the trial court that the statute as applied was repugnant to the United States Constitution. * * * *" (Emphasis mine)

If these statements of fact be true, it is indeed hard to understand why the opinion of the Circuit Court of

Raleigh County, West Virginia, as disclosed in our Appendix, pages 50 to 56, attacks the opinion of the Supreme Court of the United States in Williams vs. North Carolina; why should he speak of that case at all? Indeed, at the very inception of the trial court's opinion he addresses himself to the identical question of the legality of the Arkansas decree and he relies explicitly on the Arkansas Statute and bases his decision on the Arkansas Statute and Wheat vs. Wheat, construing that statute. In this connection, we direct the Court's attention to the motion of appellee appearing on pages 15 to 18 of our statement on the jurisdiction.

The Circuit Court of Raleigh County, West Virginia, thus sustained the Arkansas Statute, there was no reason for the appellant to attack that Statute. In both of her bills, the appellant had attacked the divorce decree as void for want of domicile to support it and as having been obtained fraudulently and to meet this allegation the appellee himself pleaded and urged upon the Court the void Arkansas Statute, in this he was sustained. It is from this holding this appeal is prosecuted. At the first opportunity, after that statute was so held to be valid, it was attack in the State Supreme Court of West Virginia, as will appear from the allegations of the petition for appeal and supersedeas to the Supreme Court of Appeals of West Virginia, which is in the certified record.

Up to the time of that opinion by the trial court, the plaintiff had interposed as a defense only (a) "The plaintiff, Nettie Smith, was no longer the wife of Hunter Smith by virtue of the Arkansas divorce decree" (b) "That Nettie Smith was guilty of desertion of Hun

ter Smith and consequently was not entitled to relief". This is the only defense set up. The prayer of the bill sought to set aside said divorce and to declare it null and void, the trial court sustained the statute and the decree attacked.

At page 17 Mr. Henderson says:

> "Judge Maxwell, in his theory of the case, has proceeded on domicile. The case of Wheat vs. Wheat expressly distinguishes between domicile and residence, * * * *".

If the validity of the statute was not raised why this statement? Furthermore, let us bear in mind that the above quoted statements of fact are made in the face of the statements of the final decree appealed from. (See our Appendix page 45) Embodied in that decree is the record proof of the questions raised before the trial judge, "the Court having heard counsel pro and con respectively on said motion", then necessarily held against the necessity of domicile as urged by counsel for appellant, as clearly understood by counsel for appellee. The decree proceeds at page 47 to hold the divorce granted under that statute to be valid and binding; this, the appellant in her amended bill of complaint, had challenged as void, for the want of domicile of the plaintiff in Arkansas. The trial court granted full faith and credit to that Arkansas decree, notwithstanding, the decisions of the Supreme Court of the United States in the case of Williams vs. North Carolina, as presented and urged upon the trial court by counsel for appellant as above disclosed and as disclosed by the very verbage of the opinion of the trial court.

THE JUDGMENT APPEALED FROM DOES NOT REST UPON ADEQUATE NON FEDERAL BASIS: In support of the affirmative of the above question, the appellee urges the procedural question decided by the trial court, wherein the trial court, in its decree, said:

> "The plaintiff, Nettie Smith, has failed to present any evidence of earnings and income of the defendant, Hunter Smith, upon which the court could in anywise decree a monetary sum of the support and maintenance of the said Nettie Smith as prayed for in her said bill of complaint".

This, counsel for appellee, urge is the adequate non federal basis for the decision of the trial court. This procedural question, they say, defeats the attack on the divorce statute of Arkansas. A mere statement of the question refutes the assertion. This relief was secondary relief as evidenced by the prayer of the plaintiff's amended bill of complaint. Her bill seeks to have the voluntary confessed awards made by the Arkansas Court, adjudged to her or, in the alternative, an adequate award and she sought also the maintenance of her marital relation. The latter having become the chief issue presented.

We anticipated this position and covered it rather thoroughly in our statement on the jurisdictional question. We shall not repeat what we said there. Suffice it to say, this was an afterthought of counsel and the court. The more momentous constitutional questions and plaintiff's marital status had claimed the attention of the court. The decisions of those questions preceded the decision of this secondary question. Furthermore, the

statement of the court in the decree has not a scintilla of basis in fact on which to rest. The statement of the trial court in this regard is neither supported by the facts in the case, nor the law of the State of West Virginia. We cover the facts in our previous statement. Illustrative of the law of the State of West Virginia on this question is the very interesting case of **Goff vs. Goff**, 60 W. Va. 9, 53 S. E. 769. The second point of the syllabus of which is as follows:

> 2. Same — Permanent Alimony.
>
> Permanent alimony decreed in a fixed annual sum, the defendant appearing in the case or served with process, is a personal decree and a lien on his land, though such alimony be payable in installments in the future.

It would serve no good purpose to discuss this question on this jurisdictional question. Suffice it to say, that the decree of this court of chancery in the instant case is indeed a frail statement of the boasted equity maximums, chief of which is, "where the law affords a right, it will afford a remedy for its enforcement". (2) Surely the law of West Virginia affording separate maintenance for the wife does not make it available to the wife, only upon her discovery of the fund from which it is to be

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(2) In our Jurisdictional Statement on page 3 we cited authorities on the right involved, however, we cited Snyder vs. Lane as reported in 63 S. E., this was error, it should have been 65 S. E. 483.

paid. Such a principle reduces courts of equity to a helpless status. Surely, the jurisdiction of the Supreme Court of the United States is not so easily defeated.

Respectfully submitted.

J. W. MAXWELL,
Counsel for Appellant.

J. W. MAXWELL
BOX 469
BECKLEY, WEST VIRGINIA

PROOF OF SERVICE

STATE OF WEST VIRGINIA,
COUNTY OF RALEIGH, TO-WIT:

I, Peggy Ann Adkins, stenographer and secretary in the office of J. W. Maxwell, attorney of record for Nettie Smith, Appellant, herein, depose and say that on the 11th day of April, 1961, I served a copy of the foregoing Brief of Appellant in Opposition to Motion to Dismiss or Affirm, addressed to the Supreme Court of the United States, in the case of Nettie Smith, Appellant, against Hunter Smith, Appellee, by delivering four copies of the same to the receptionist, secretary, and stenographer, in the office of Lynch and Henderson, counsel of record for said Hunter Smith, located at 111 Main Street, Beckley, West Virginia.

Peggy Ann Adkins

Taken, subscribed and sworn to before me at Beckley, West Virginia, this the 11th day of April, 1961.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

My commission expires. 4/8/67

Notary Public in and for
Raleigh County, West Virginia.